U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 29, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

On September 23, 2009, the Attorney General issued a memorandum establishing new procedures and standards to govern the Department's defense of an assertion of the state secrets privilege in litigation. Pursuant to that memorandum, I am pleased to enclose the first periodic report to congressional committees on such cases.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide further assistance on this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Member

STATE SECRETS PRIVILEGE REPORT

On September 23, 2009, the Attorney General issued a memorandum for Executive Branch departments and agencies setting forth procedures and standards governing the Department of Justice's defense of an assertion of the state secrets privilege in litigation (State Secrets Policy). The Attorney General's memorandum states that the Department will provide periodic reports to appropriate congressional oversight committees with respect to future cases in which the Government invokes the privilege in litigation and will set forth the basis for invoking the privilege. This is the first of those reports. In addition to the information provided below about the two cases in which the privilege has been invoked under the new policy, we also have described below the process that led to its adoption by the Attorney General.

The new procedures and standards governing defense of the state secrets privilege are intended to ensure greater accountability and reliability in the invocation of the privilege. They were developed in the wake of public criticism concerning the propriety of the Government's use of the state secrets privilege. To address those concerns, the Attorney General established a Departmental Task Force early in 2009 to analyze how the privilege had been invoked in pending cases and to consider whether the Department's procedures for reviewing and defending privilege assertions should be revised. The Task Force drew upon a case by case analysis of then-pending cases in which the privilege had been asserted to determine whether the privilege had been properly invoked. The Task Force included senior lawyers from the Department's leadership offices as well as career Department lawyers with experience in litigating cases in which the state secrets privilege had been invoked.

For each pending case, the Task Force reviewed all key pleadings and relevant case law, as well as classified declarations from agency heads and others submitted in support of the privilege, and interviewed Department counsel litigating the case. The Task Force then evaluated all of the cases as a group to assess the privilege assertions on a comparative basis before coming to rest on an analysis and recommendation for each case. Several points emerged from the review:

- In each of the cases reviewed, the Task Force concluded that the risk to national security was sufficiently grave, and the evidentiary submission made to the court to support the privilege was sufficiently strong, that invocation of the privilege was warranted and should be maintained.

- The Government has invoked the state secrets privilege sparingly and appropriately. At the time of the Task Force review, the privilege had been invoked in a very small number of cases out of the thousands of cases the Department was litigating.

- Several of the cases in which the privilege was invoked involved purely private litigation – not challenges to Executive Branch conduct. In these cases, the Government had

intervened to assert the privilege to protect sensitive national security information, disclosure of which the Task Force concluded reasonably could be expected to result in significant harm to national security, and which would have become the subject of discovery or otherwise disclosed in the course of litigation.

- In approximately half of the pending cases reviewed by the Task Force, the Government had invoked the privilege in a way that allowed the case to proceed to judgment while simultaneously protecting classified information.

- In the remaining cases reviewed, the Government had properly determined that the case could not proceed to judgment without a disclosure that reasonably could be expected to cause significant harm to national security.

- In each pending case evaluated by the Task Force, the Government had provided reviewing courts with lengthy, well documented classified submissions setting forth the information that the litigation threatened to expose, the national security interests at stake, and other relevant information. These factual submissions uniformly provided the court with an ample basis for understanding why the evidence in question could not be made public and why the claims and defenses at issue could not be litigated without a disclosure that reasonably could be expected to cause significant harm to national security.

- In each pending case evaluated by the Task Force, the Government invoked the privilege to avoid disclosures of intelligence sources or methods, which reasonably could be expected to cause significant harm to national security.

Based upon its case by case analysis, the Task Force concluded that no change was warranted with respect to the assertions of privilege in the pending cases it reviewed. However, the study also led the Department to conclude that changes in the procedures by which privilege assertions are invoked, and clarification of the standard articulated by the Government for asserting the privilege, would provide greater accountability and reliability in the invocation of the state secrets privilege in litigation and strengthen public confidence. In light of these conclusions, the Attorney General decided to formalize the standard and procedures for invoking the state secrets privilege and to expand the process by which privilege assertions are reviewed and approved before being defended in litigation by the Department.

I. State Secrets Review Policy

The procedures approved by the Attorney General are roughly modeled on the Department's Capital Case Review Process (which regulates the Department's decisions whether to seek the death penalty). The key features of the process are set forth below.

1. Standards for Determination

A. Legal Standard. The Department will defend an assertion of the state secrets privilege in litigation when a Government department or agency seeking to assert the privilege makes a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations ("national security") of the United States.

B. Narrow Tailoring. The Department's policy is that the privilege should be invoked only to the extent necessary to protect against the risk of significant harm to national security. The Department will seek to dismiss a litigant's claim or case on the basis of the state secrets privilege only when doing so is necessary to protect against the risk of significant harm to national security.

C. Limitations. The Department will not defend an invocation of the privilege in order to: (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization or agency of the United States Government; (iii) restrain competition; or (iv) prevent or delay the release of information that would not reasonably be expected to cause significant harm to national security. Any credible evidence of wrongdoing that is identified in the review process will be referred to the appropriate inspector general.

2. Initial Procedures for Invocation of the Privilege

A. Evidentiary Support. The head of the Government department or agency seeking invocation of the privilege in litigation must submit to the Division in the Department with responsibility for the litigation in question a detailed declaration based on personal knowledge that specifies in detail: (i) the nature of the information that must be protected from disclosure; (ii) the significant harm to national security that disclosure can reasonably be expected to cause; (iii) the reason why disclosure is reasonably likely to cause such harm; and (iv) any other information relevant to the decision whether the privilege should be invoked.

B. Recommendation from the Assistant Attorney General. The Assistant Attorney General for the Division responsible for the matter shall formally recommend in writing whether or not the Department should defend the assertion of privilege in litigation based on a personal evaluation of the evidence that the standards in Section 1A above are satisfied.

3. State Secrets Review Committee

A. Review Committee. A State Secrets Review Committee consisting of senior Department of Justice officials designated by the Attorney General will evaluate the Assistant Attorney General's recommendation to determine whether invocation of the

privilege is warranted.

B. Consultation. The Review Committee must consult as necessary and appropriate with the department or agency seeking invocation of the privilege in litigation and with the Office of the Director of National Intelligence. In particular, the Committee must engage in such consultation prior to making any recommendation against defending the invocation of the privilege in litigation.

C. Recommendation by the Review Committee. The Review Committee shall make a recommendation to the Deputy Attorney General, who in turn shall make a recommendation to the Attorney General.

4. Attorney General Approval

A. Attorney General Approval. The Department will not defend an assertion of the privilege in litigation without the personal approval of the Attorney General (or in the absence or recusal of the Attorney General, the Deputy Attorney General or the Acting Attorney General).

B. Referral to Agency or Department Inspector General. If the Attorney General concludes that it would be proper to defend invocation of the privilege in a case, and that invocation of the privilege would preclude adjudication of particular claims, but that the case raises credible allegations of Government wrongdoing, the Department will refer those allegations to the Inspector General of the appropriate department or agency for further investigation, and will provide prompt notice of the referral to the head of the appropriate department or agency.

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The Department has applied and will continue to apply these procedures faithfully in reviewing and defending the invocation of the privilege. The Department believes that good faith adherence to the standards and procedures outlined above will ensure the privilege is invoked in an appropriately narrow set of circumstances. The Department also believes that these reforms have materially enhanced prior practices by formalizing the standard as well as the process of subjecting privilege assertions to rigorous internal review. The policy helps ensure that the Executive Branch invokes the privilege only to the extent necessary to protect significant national security interests. Although there may be cases in which the Executive Branch will seek dismissal on the ground that a particular case cannot proceed without risking significant harm to national security, such cases should continue to be rare. The United States Court of Appeals for the Ninth Circuit noted the Department's new policy in a recent *en banc* decision and commented favorably that, "[a]lthough [Supreme Court precedent] does not require review and approval by the Attorney General when a different agency head has control of the matter, such additional review by the executive branch's chief lawyer is appropriate and to be encouraged." *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080 (9th Cir. 2010) (en banc).

In addition, the Executive Branch has committed to continue its practice of supporting any invocation of the privilege with detailed evidentiary submissions that provide a firm foundation for the court to evaluate whether the Government has demonstrated a risk of significant harm to national security. The Department recognizes that courts have an essential and independent role to play in reviewing the Executive's assertion of the privilege and will continue to assist courts in carrying out their role.

The Attorney General's formal process for invocation of the privilege is designed to minimize the costs that invocation of the privilege can impose. Thus, while judicial consideration of the privilege assertion may sometimes involve *ex parte* and *in camera* review, the Department's internal procedures – which provide for multiple levels of review and unprecedented requirements of personal approval by the Department's highest officials based on personal consideration of the underlying materials – are designed to provide additional guarantees of reliability. Similarly, while invocation of the privilege may result in the dismissal of some claims, the Department's policy seeks to avoid that result whenever possible, consistent with national security interests. The policy also provides for referral by the Attorney General to the relevant Inspector General for internal review in cases in which the Government's invocation of the privilege would preclude litigation of claims that raise credible allegations of Government wrongdoing.

II. Report on Privilege Assertions Under Policy

Consistent with Section 5 of the new State Secrets Policy, the Department has provided below the first periodic report to your Committee regarding all cases in which the privilege has been invoked under the Policy on behalf of departments or agencies in litigation, including the basis for invoking the privilege.[1]

Since the issuance of the State Secrets Policy in September 2009, the Department of Justice has invoked the state secrets privilege in two civil cases: *Shubert et al.* v. *Obama et al.*, No. 07-cv-00693-VRW (N.D. Cal.); and *Al-Aulaqi* v. *Obama*, 10-1469 (D.D.C.).[2]

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1 In other pending cases, the Department has continued to defend assertions of the privilege that were made prior to the 2009 procedures based on its determination that the privilege had been properly invoked and fully supported and that defense of the privilege would be consistent with the Department's policy.

2 The Court of Appeals for the Second Circuit has held that when the Government invokes the Classified Information Procedures Act (CIPA) to protect classified information in criminal litigation, it is in fact asserting the state secrets privilege. *See United States* v. *Aref*, 533 F.3d 72, 80 (2008); *United States* v. *Stewart*, 590 F.3d 93, 130-131 (2009). The Government strongly disagrees with that conclusion, which another court of appeals has expressly declined to adopt. *See United States* v. *Rosen*, 557 F.3d 192, 198 (4th Cir. 2009). CIPA provides a statutory framework to assure that criminal defendants receive information necessary to ensure a fair trial while protecting properly classified information. To comply with the Second Circuit's decisions, however, the Government has made technical assertions of the state secrets privilege during this reporting period as part of CIPA litigation in certain criminal cases in the district courts within that Circuit.

1. *Shubert v. Obama*

Shubert is one of a number of cases within the *In re National Security Telecommunications Records Litigation* multi-district litigation (MDL) proceedings in the Northern District of California, MDL No. 3:06-md-01791-VRW (N.D. Cal.). The cases in this MDL proceeding challenged alleged National Security Agency (NSA) surveillance activities, including the now-defunct Terrorist Surveillance Program (TSP) under which NSA had been authorized to intercept certain international communications into and out of the United States of persons linked to al-Qaida or related terrorist organizations.

In *Shubert*, plaintiffs allege that the NSA is engaged in what the complaint calls a "dragnet" of warrantless surveillance that encompasses their telephone and internet communications. Plaintiffs further allege that telecommunications companies worked in concert with NSA to conduct the alleged surveillance. The federal government defendants moved to dismiss the complaint based in part on an assertion of the state secrets privilege by the Director of National Intelligence (DNI).

The DNI's privilege assertion protects information concerning NSA intelligence sources and methods at risk of disclosure in order to address plaintiffs' allegations, including whether any plaintiff has been subject to NSA activities. The DNI determined, and the Attorney General agreed, that disclosure of such information reasonably could be expected to cause significant harm to the national security of the United States. For example, identifying whether particular individuals have been subject to alleged NSA activities, the DNI explained, would reveal the existence, scope, and/or targets of possible intelligence actions. In response to plaintiffs' allegations about the existence of surveillance activities broader than the TSP, the DNI explained that attempting to address what activities NSA has or has not engaged in would require the disclosure of highly classified NSA intelligence sources and methods that would cause exceptionally grave harm to national security.

In addition, because the plaintiffs assert that the alleged surveillance activities of NSA were conducted with the assistance of particular private telecommunications companies, the DNI also explained that confirmation or denial of whether NSA has had an intelligence relationship with specific private companies would cause exceptional harm to national security. Congress, sharing this concern, enacted the Foreign Intelligence Surveillance Act Amendments of 2008, which, *inter alia*, added to the FISA procedures that may be invoked by the Attorney General, in certain defined circumstances, to foreclose actions that seek to disclose whether particular telecommunications companies have assisted an element of the intelligence community.

On January 10, 2010, the district court dismissed the complaint in *Shubert* (and in another case that raised identical allegations, *Jewel v. Obama*) on the ground that plaintiffs lacked standing to litigate the claims they asserted. The district court did not address the Government's invocation of the state secrets privilege. Plaintiffs appealed the district court's decision to the Ninth Circuit, where the case is currently pending.

2. *Al-Aulaqi v. Obama*

The United States also asserted the state secrets privilege, alternatively, and as a last resort, in a lawsuit brought in U.S. District Court for the District of Columbia by the father of Anwar Al-Aulaqi, a leader of al-Qaida in the Arabian Peninsula (AQAP), who has taken on an increasingly operational role in AQAP. Plaintiff alleged that the Government is targeting Anwar al-Aulaqi for the use of lethal force without regard to whether he presents a concrete, specific, and imminent threat to life or physical safety, and without regard to whether there are means other than lethal force that could reasonably be employed to neutralize the threats. Plaintiff also asked the court to order the Government to disclose any criteria that may exist for determining whether the Government would carry out the use of lethal force against a U.S. citizen.

The Government opposed plaintiff's motion for preliminary injunction and moved to dismiss, raising several threshold jurisdictional defenses, including that: 1) plaintiff lacked standing to bring suit; 2) plaintiff's claims would require the court to decide non-justiciable political questions; 3) the court should exercise its equitable discretion not to grant the relief sought; and 4) plaintiff had no cause of action under the Alien Tort Statute. In the alternative, the Government also argued that, to the extent that the case is not dismissed based on the foregoing defenses, information protected by the state secrets privilege would be necessary to litigate plaintiff's claims and the case, therefore, could not proceed without significant harm to the national security of the United States. The Government urged the Court not to reach the privilege assertion unless all of the other defenses had been exhausted. The Secretary of Defense, the Director of National Intelligence, and the Director of the Central Intelligence Agency each made formal claims of privilege to protect from disclosure various categories of information implicated by the allegations in this case.

Summarized in unclassified terms (and without confirming or denying any allegation in the Complaint), the privilege assertions encompassed not only whether or not the United States plans the use of lethal force against particular terrorist adversaries overseas but, if so, pursuant to what information and procedures. More specifically, the privilege assertions protected: (i) intelligence information that would reveal the Government's knowledge as to the imminence of any threat posed by AQAP or Anwar al-Aulaqi, and the sources and methods by which such intelligence was obtained; (ii) information concerning allegations about possible operations in Yemen and any criteria or procedures that may be utilized in connection with any such operations; (iii) information concerning security, military, or intelligence relations between the United States and Yemen; and (iv) any other information that would tend to confirm or deny any allegations in the Complaint pertaining to the CIA. The disclosure of such information reasonably could be expected to cause significant harm to the national security of the United States.

As explained by the senior national security officials who asserted the privilege, revealing to a terrorist organization what the United States may know of their plans would enable that organization to alter their plans and conceal their plotting. Similarly, disclosure of whether lethal force has been authorized against a terrorist organization overseas, and, if so, the specific targets of such action and any criteria and procedures used to determine whether to take action,

would likewise enable that organization to determine whether or not, when, how, or under what circumstances, the United States may utilize lethal force overseas – critical information needed by hostile adversaries to evade U.S. action. The disclosure of classified information concerning military or intelligence relations with a foreign state also would risk significant harm to those relations as well as foreign relations generally and, as a result, to U.S. national security. When each of plaintiff's claims was considered in light of the privileged information as detailed in the classified submissions, it was apparent that to litigate any aspect of the case would require the disclosure of highly sensitive national security information concerning alleged military and intelligence actions overseas. The case therefore could not proceed.

On December 7, 2010, the United States District Court for the District of Columbia dismissed the *Al-Aulaqi* action without reaching the Government's state secrets privilege assertion. *Al-Aulaqi v. Obama*, 727 F. Supp.2d 1 (D. D.C. 2010). The plaintiff did not appeal.

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This concludes the Department's first report to Congress pursuant to its new policy regarding the State Secrets Privilege. The Department will provide future reports on a periodic basis regarding cases in which the Government has invoked the privilege on behalf of departments or agencies, explaining the basis for the decision in each case.